## Wawan bin Sanrego v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–128 OF 2008
ABU SAMAH, AZHAR MA'AH JJCA, AND DAVID WONG J
21 OCTOBER 2011

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*Criminal Law — Murder — Whether intention to kill present — Deceased died of single stab wound to chest — Whether infliction of wound while accused was moving raised doubt whether he intended to cause bodily injury sufficient to cause death*

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The appellant ('accused') was convicted by the High Court for the murder of a co-worker ('the deceased') in a plantation. The prosecution led evidence that on the night in question the deceased had reported to the plantation manager ('PW5') that there was a commotion at the worker's quarters involving the accused and two others. Shortly after PW5, his two assistants and the deceased arrived at the quarters on their respective vehicles, they noticed the accused and another person descending the verandah of the quarters each holding a long parang and performing a 'silat' movement. On seeing this menacing conduct, PW5, his assistants and the deceased decided to leave the area but as they were heading back to their parked vehicles, PW5 heard a scream and turned around and saw the accused rushing towards the deceased and striking him around the left side of his chest and uttering loudly 'kau yang complain manager, nah'. PW5 was also stabbed in the commotion by another person. PW5's assistants used their motorcycles to take PW5 and the deceased, who was still alive, away from the scene. The deceased succumbed to his injury at the hospital. In his appeal to the Court of Appeal against conviction and sentence, the accused argued that none of the prosecution's witnesses said they saw what weapon was used to inflict the fatal stab wound on the deceased. The post-mortem report showed the wound was not made by a parang but by a small sharp object. PW5 was stabbed by someone with a knife but it was not the appellant. The knife was not recovered. Under the circumstances, the accused argued, the prosecution witnesses could have mistaken the identity of the person who injured the deceased and it was unsafe to conclude that he was that person.

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**Held,** unanimously allowing the appeal and substituting the murder conviction with a conviction for manslaughter and the death sentence with a sentence of 18 years' jail:

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(1) There was reasonable doubt whether the accused had inflicted the fatal injury with intention to cause bodily injury sufficient in the ordinary cause of nature to cause death (see para 13).

(2) It was undisputed that the deceased, PW5 and his two assistants were at that point in time in a state of fear and rushing back to their vehicles. It could reasonably be concluded the deceased did not turn around to face the accused until the accused had caught up with him as the deceased's mindset then was to get to his motorcycle as soon as possible. The stab wound was inflicted as and when the deceased turned around to face the accused. The accused was in a moving position when the stab wound was inflicted which raised doubt as to whether the single stab wound was inflicted with the intention of causing bodily injury sufficient in the ordinary cause of nature to cause death (see para 13).

(3) The trial judge should not have called upon the accused to enter his defence to the charge of murder but should have done so for the offence of manslaughter under s 304(a) of the Penal Code. (see para 13).

**[Bahasa Malaysia summary**

Perayu ('tertuduh') disabitkan oleh Mahkamah Tinggi atas pembunuhan rakan sekerja ('si mati') di ladang. Pihak pendakwaan mengemukakan keterangan bahawa pada malam yang dipersoalkan si mati telah melaporkan kepada pengurus ladang ('PW5') bahawa terdapat kekecohan di kuarters pekerja melibatkan tertuduh dan dua yang lain. Sebaik sahaja PW5, dua pembantunya dan si mati tiba di kuarters dengan kenderaan masing-masing, mereka melihat tertuduh dan seorang yang lain turun daripada beranda kuarters masing-masing memegang parang yang panjang dan melakukan pergerakan 'silat'. Melihat tingkah laku mengancam ini, PW5, pembantu-pembantunya dan si mati memutuskan untuk meninggalkan kawasan tersebut tetapi semasa mereka sedang menunju kembali ke kenderaan mereka, PW5 mendengar jeritan dan menoleh ke belakang dan nampak tertuduh berlari ke arah si mati dan menetak dia di bahagian kiri dadanya dan menyebut dengan kuat 'kau yang complain manager, nah'. PW5 juga ditikam dalam kekecohan oleh seorang yang lain. Pembantu-pembantu pengurus menggunakan motosikal mereka untuk membawa PW5 dan si mati, yang masih hidup, jauh dari tempat kejadian. Si mati meninggal dunia akibat kecederaanya di hospital. Tertuduh dalam rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman, berhujah bahawa tidak seorang pun saksi-saksi pendakwaan menyatakan mereka melihat senjata digunakan untuk mengenakan tikaman maut ke atas si mati. Laporan post-mortem menunjukkan luka tersebut bukan disebabkan oleh parang tetapi objek kecil yang tajam. PW5 ditikam oleh seseorang dengan pisau tetapi bukan perayu. Pisau tersebut tidak dijumpai. Di bawah keadaan ini, tertuduh berhujah, saksi-saksi pendakwaan mungkin telah tersilap identiti orang yang mencederakan si mati dan adalah tidak selamat untuk memutuskan bahawa dia lah orang tersebut.

**Diputuskan,** membenarkan rayuan dan menggantikan sabitan pembunuhan denagn sabitan pematian orang dan hukuman mati dengan hukuman penjara 18 tahun:

(1) Terdapat sebab munasabah sama ada tertuduh telah mengenakan

kecederaan maut dengan niat untuk menyebabkan kecederaan badan mencukupi dalam sifat biasa untuk menyebabkan kematian (lihat perenggan 13).

(2) Tidak dapat dipertikaikan bahawa si mati, PW5 dan dua pembantunya pada masa tersebut berada dalam ketakutan dan berlari balik ke kenderaan mereka. Adalah munasabah untuk memutuskan si mati tidak menoleh ke belakang untuk memandang tertuduh sehingga tertuduh sempat mengejar dia memandangkan fikiran si mati pada ketika itu adalah untuk bergerak ke motosikalnya secepat mungkin. Luka tikaman dikenakan apabila si mati menoleh ke belakang untuk menghadapi tertuduh. Tertuduh dalam kedudukan bergerak apabila luka tikaman dikenakan yang membangkitkan kesangsian terhadap sama ada luka tikaman tunggal tersebut dikenakan dengan niat untuk menyebabkan kecederaan badan mencukupi dalam sifat biasa untuk menyebabkan kematian (lihat perenggan 13).

(3) Hakim perbicaraan tidak patut memanggil tertuduh untuk memasukkan pembelaannya kepada tuduhan membunuh tetapi patut melakukan untuk kesalahan pematian orang di bawah s 304(a) Kanun Keseksaan (lihat perenggan 13).]

**Notes**

For cases on whether intention to kill present, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1539–1541.

**Cases referred to**

*Chan Kwee Fong v PP* [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)

**Legislation referred to**

Penal Code ss 302, 304(a)

**Appeal from:** Criminal Trial Suit No S45–03 of 2006 (High Court, Sandakan)

*Hamid Ismail (Hamid & Co) for the appellant.*
*Salim bin Soib (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

**David Wong J:**

INTRODUCTION

**[1]** The appellant was charged with the offence of murder ( s 302 of the Penal Code) of one Haris bin Padu on 13 March 2006 at about 8.30pm at Ladang Berakan Maju, IJM Plantation Sugut, in the District of Beluran, Sabah. The appellant was found guilty by the High Court, Sandakan and sentenced to

death. He now appeals to this court.

BACKGROUND FACTS

**[2]** The prosecution's case in substance is this. On the night of 13 March 2006, the deceased reported to the plantation manager ('PW5') of the IJM plantation at Sugut that there was a commotion in the worker's quarters involving the accused, one Asdi and Roca. Acting on that report of the deceased, the plantation manager (PW5) with his assistants ('PW7 and PW8') and the deceased went to the quarters. PW5 drove his jeep while the other three went there on their own motorcycles. Upon reaching the quarters, PW5 approached Block B where the accused, Asdi and Roca were sitting on the verandah. Upon seeing them, Asdi came down from the verandah to meet PW5 who was then with PW7, PW8 and the deceased. Asdi and PW5 then had a discussion on the commotion but at that moment he also saw the accused and Roca coming down from the verandah each holding a long slashing *parang* and at the same time doing *silat* movement. In view of the menacing conduct of the accused and Roca, PW5, PW7, PW8 and the deceased decided to leave the area. PW5's jeep was parked in front of Block D and as he was walking towards the jeep, he heard a scream and instinctively turned around and saw the accused rushing towards the deceased and struck him around the left side of his chest uttering loudly 'Kau yang complain manager, nah'. The distance between the accused and PW5 was about 10–15 feet and the lighting at that time was good which allowed PW5 to see what had happened to the deceased. However PW5 could not see the weapon used by the accused to stab the deceased. The deceased then ran away after being stabbed and managed to get on the motorcycle used by PW7 to get away from the scene. PW5 while witnessing what had happened to the deceased and not realising that Asdi was behind him was stabbed by Asdi in the right side of stomach. PW5 then ran away from his jeep after being stabbed. PW8 then came to PW5 on his motorcycle and PW5 jumped on the motorcycle. PW5 was then taken to the office and subsequently to Sungai Sabang Clinic for treatment. The deceased was also taken to the clinic and was attended by PW6 who is the nurse there. PW6 together with the deceased's relative then took the deceased to the Beluran Hospital where the deceased succumbed to the injury.

PETITION OF APPEAL

**[3]** The appellant in his petition of appeal had listed 17 grounds, which the court agrees with counsel for the appellant can be summarised into three grounds which are:

(a) no prima facie case was established;

(b) the improper evaluation of the accused's evidence; and

(c) the charge was not proven beyond reasonable doubt.

NO PRIMA FACIE CASE

**[4]** The learned judicial commissioner (as she then was) in her grounds set out the correct ingredients which the prosecution needs to establish beyond reasonable doubt to secure a conviction and they are as follows:

(a) that the death of Haris bin Pabu has taken place;

(b) that such death has been caused by, or is a consequence of, the act of the accused; and

(c) that such act (i) was done with the intention of causing death; or (ii) was done with the intention of causing such bodily injury as (a) the accused knew it was likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death; or (iii) was known to him to be so iminently dangerous that it must in all probability cause (a) death; or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

**[5]** It is the court's view that the evidence in respect of the first ingredient of the offence is overwhelming and the learned JC was right to conclude that the deceased is one Haris bin Pabu.

**[6]** As for the second ingredient of the offence, counsel for the appellant in his submission submits that the learned JC had failed to properly appreciate the prosecution evidence in that she had overly relied on the evidence of PW5 and PW7 as witnesses to the stabbing without taking into consideration as to whether their evidence is probable or not. The reasons why the appellant says that PW5 and PW7 evidence is not probable are these. It is undisputed that both PW5 and PW7 did not see what weapon the accused used to inflict the stab wound but did see the accused and Asdi were respectively holding a *parang*. The evidence of the doctor ('PW1') who performed the post-mortem shows that the wound inflicted to the accused was not by a *parang* but a small sharp object. Further it is submitted that as Asdi was the only one holding a knife, the injury could not have been inflicted by the accused. It is also submitted that the atmosphere at the night of the incident was tense and PW5 and PW7 could have been mistaken as to the identity of the person who inflicted the wound to the accused. There were also discrepancies as to how the vehicles were parked and in the description by witnesses as to what happened that night. Furthermore as the knife was not recovered, counsel submits that taking the evidence in totality, it is not safe to conclude that it was the accused that had stabbed the deceased.

**[7]** With respect, the learned JC had in her grounds meticulously dealt with the points raised by counsel for the accused. As for the contention that there was discrepancy of testimonies, this is what she said:

> There will always be discrepancies when two or more persons are asked to narrate something which they have witnessed. Accuracy in recollection depends on many variables such as the passage of time since the incident and whether the witness commits what they have seen or heard to their memory. The state of mind also plays a part and that includes whether the witness is paying attention to what is happening around him, whether he is in the state of anxiety and fear and whether the things happening around are out of the ordinary so as to catch his attention. Perception of things will also vary if witnesses are looking at something from different angles and the objects they are looking at are not still but in active movement.
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> While there will always be discrepancies, the discrepancies must not be so material as to go to the root of the case thereby rendering the account of the witness highly improbable and suspect so that the court will reject it.
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> Coming back to the above discrepancies, I do not consider them to be material discrepancies that should render the account of the stabbing given by PW5, PW7 and PW8 suspect. What these evidence has clearly established is that the three witnesses together with the deceased had gone to the workers' quarters where commotion was reported to have taken place and that upon arrival, PW5 had talked to Asdi face to face, that he had talked for about 3–5 minutes before Roca and the accused were seen coming down from the verandah doing 'silat' with their *parang*.

**[8]** As to who had caused the injury on the deceased that night the learned JC had evaluated the testimonies as these:

> After a careful perusal of the notes of evidence, I am compelled to point out that PW5 did not testify that the accused 'jumping or stabbing' the deceased. What he testified are as follows: 'I turned around and saw Wawan bin Sanrego rushing towards Haris bin Pabu in a jumping motion and striking him around the left side of his chest', (p 20 line 22–23 nop). In other words, PW5 saw the accused pounce on the deceased and stab him. PW7 also testified that he heard the accused say, 'Kau yang komplain manager, nah' and then he jumped and stabbed the deceased, (p 54–55 nop). I still recall vividly the stabbing action acted out by PW7 when he demonstrated to court what he had seen the accused do when he pounced on the deceased.
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> Learned counsel for the defence further submitted that it is the testimony of PW5 and PW7 that they saw the accused carrying a *parang*, but where was that *parang* when the accused jumped and stabbed the deceased. She submitted that the prosecution has adduced no evidence as to how the accused jumped on the deceased and from where the accused jumped. It is submitted that it is questionable whether the accused had really jumped on and stabbed the deceased.
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> Even though there is no evidence from where the accused jumped on the deceased and stabbed him, there is clear evidence from PW5 that he saw the accused rushing towards the deceased in a jumping motion and striking him around the left side of

the chest. His observation of the accused stabbing on the left side of the deceased's chest is consistent with the subsequent finding in the post-mortem, namely, a small stab wound was found just above the left nipple.

I accept the opinion of PW1 that the weapon used to cause the stab wound on the deceased is consistent with a sharp object like a *kris*, dagger or knife. That being so, it is not surprising that PW5 and PW 8 made no reference to the *parang* used by the accused because he obviously did not use it to hurt the deceased. As the probable sharp weapon used to stab the deceased is a small weapon like a *kris* or dagger, it is not improbable for the witnesses not to be able to see it. This is especially so when the post-mortem reveals that there was only one stab wound inflicted on the deceased, which logically suggests that the accused had only stabbed the deceased once. In other words, there was no successive or continuous act of stabbing which, if there were, might afford more opportunity for PW5 and PW8 to see the weapon that was used to stab the deceased. Combine that with the fact that the weapon is small, it is not unreasonable that PW5 and PW8 did not see the weapon used by the accused to stab the deceased …

The defence further argued that by reason of the investigating officer's failure to recover the murder weapon, there is a gap in the prosecution case and that the prosecution has failed to establish the chain of evidence which could link the accused to the death of the deceased.

If I agree with the above submission of the learned counsel for the defence, it would mean that the court could never convict a murder criminal unless the murder weapon is retrieved. This is not the position of the law and I find support in the case of *Sunny Ang v Public Prosecutor* [1960] 2 MLJ 195. In that case the appellant was convicted of murder. The body of the murder victim was never found but there was overwhelming evidence on the record that the appellant murdered her. The Federal Court upheld the conviction as in its judgement, no miscarriage of justice had occurred in this case. *Sunny Ang*'s case, shows that the court will convict on overwhelming evidence even if the body of the murder victim is not found. Likewise, this court will convict if there is ample credible evidence to connect the accused to the murder notwithstanding that the murder weapon was for some reason not retrieved.

In this respect, the prosecution has adduced clear and direct evidence from the eye-witnesses ie PW5 and PW7 that it was the accused who stabbed the deceased. The fact that they did not see the weapon albeit there was good lighting at the scene does not in any way undermine their testimonies of what they had seen the accused do to the deceased.

After carefully assessing the evidence of PW5 and PW7, it is my finding that there is credible evidence to show that the death of the deceased was caused by the act of the accused.

**[9]** The evaluation of evidence by the learned JC cannot be faulted as her conclusion is not one which no reasonable tribunal cannot reach. Her findings are consistent and supported by the evidence before her. Hence the court finds no merit in this ground.

**[10]** As for the third ingredient which relates to the intention of the accused to inflict injuries which in the natural course of event would cause death, this is what the learned JC said:

> Whether the accused had intention to cause the death
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> Learned deputy submitted that the accused's utterance, 'Kau yang komplaint manager, nah!' shows that the intention of the accused before he struck the deceased and stabbed at the left chest above his nipple was to commit an act so imminently dangerous that it must in all probability cause the death of the deceased.
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> Learned counsel submitted that it would be wrong to infer the intention of the accused to kill the deceased based on the evidence of PW5 and PW7 who said that they had heard the utterance of 'Kau yang komplaint manager, nah!'. This is because their evidence of what they claimed to have heard is hearsay evidence which should not be admitted in evidence. The fact that the defence did not object the admissibility of this hearsay evidence during the trial does not mean that they are admissible, citing *Malaysia National Insurance Sdn Bhd v Malaysia Ruber Development Corporation* [1986] 2 MLJ 124 for support. As such, submits counsel, the prosecution has failed to adduce any evidence to show any intention of the accused in committing the offence of murder.
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> I do not agree that the evidence of PW5 and PW7 in respect of what they heard the accused had uttered before he jumped on and stabbed the deceased is hearsay evidence. This is something they heard with their own ears and is admissible as direct evidence.
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> In my opinion, the accused was plainly angry with the deceased for reporting the commotion to PW5 by his act of wielding the *parang* with 'silat movement' and subsequently uttering the words, 'Kau yang komplaint manager, nah!' in a loud and rough voice, thus when he stabbed at the deceased's left chest above his nipple, it can be reasonably inferred that he had intention to commit an act so imminently dangerous that it must in all probability cause the death of the deceased. I am therefore satisfied that the prosecution has adduced credible evidence to prove the third ingredient.

**[11]** There is no dispute by the defence that the injury caused is one which in the ordinary course of nature would cause death. The remaining issue is whether the injury was inflicted with the intention to cause bodily injury sufficient in the ordinary cause of nature to cause death.

**[12]** What amounts to intention is discussed in the case of *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671 where this court held as follows:

> … It ( s 300(C) of the Penal Code) states that the accused intended to cause bodily injury and that 'the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death'. We would gratefully apply the test laid down by V Bose J, in *Virsa Singh v State of Punjab* AIR 1958 SC 465, at p 467, and there His Lordship said:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand.

**[13]** We also accept the test laid down by the Indian case and what that entails is that the court requires proof that there was an intention to inflict that particular injury on the deceased which in our view gives rise to the issue of whether or not it was not accidental or unintentional. The starting point of our deliberation must be the circumstances in which the fatal injury was inflicted. The relevant evidence here is the undisputed evidence that the deceased, PW5, PW7 and PW8 were at that point in time in a state of fear and rushing back to their vehicle and motorcycles in view of the aggressive conduct of the accused and Asdi. What that naturally means is that the accused was rushing towards to the deceased with his back facing the on rushing accused. It can also be reasonably concluded that the deceased did not turn around to face the accused until the accused had caught up with him as the deceased's mindset then was to get to his motorcycle as soon as possible. What that also means that the stab wound was inflicted as and when the accused turned around to face the aggressive accused. In another word, the accused was in a fluid or moving position when the stab wound was inflicted which in our view raises doubt as to whether the single stab wound was inflicted with the intention to cause bodily injury sufficient in the ordinary cause of nature to cause death. With respect to the learned JC, she had not considered this aspect of the evidence and in our view if she had done so she may have come to a different conclusion. Hence it is the court's finding that there is reasonable doubt as to whether the accused had inflicted the fatal injury with intention to cause bodily injury sufficient in the ordinary cause of nature to cause death. Hence the learned JC should not have called the appellant to enter his defence for the charge of murder but should have done so for the offence of manslaughter under s 304(a) of the Penal Code.

**[14]** Accordingly we allow the appeal and set aside the conviction under s 302 of the Penal Code and substitute it with a conviction of the offence of manslaughter under s 304(a) of the Penal Code.

**[15]** In view of what we have stated above, it is not necessary to deal with ground (b) and (c) set out above.

**[16]** As for sentence, after taking into consideration of the accused's plea of mitigation, which in essence states that the accused was only 20 years old at the time of the incident, he had cooperated with the police to find the other two witnesses and that this was his first offence, in light of the seriousness of the offence and the unnecessary loss of a human life, we sentence him to an imprisonment term of 18 years to commence from the date of arrest, that is 14 March 2006.

*Appeal allowed and murder conviction substituted with a conviction for manslaughter and the death sentence with a sentence of 18 years' jail.*

Reported by Ashok Kumar